Office of the State Appellate Defender

Illinois Criminal Law Digest

May 2015

MICHAEL J. PELLETIER
State Appellate Defender

DAVID P. BERGSCHNEIDER
JAMES CHADD
Deputy State Appellate Defenders, Editors

P.O. Box 5240
Springfield, IL 62705-5240
Phone: 217/782-7203
http://www.state.il.us/defender/

TABLE OF CONTENTS

TABLE OF AUTHORITIES

APPEAL

§2-6(a)

People v. Ramirez, 2015 IL App (1st) 130022 (No. 1-13-022, modified upon denial of rehearing 5/27/15)

Defendant argued on appeal that the trial court considered improper factors at sentencing. Defendant conceded that the issue was forfeited, but argued in a single paragraph that it should be considered under the plain-error rule "because consideration of an improper sentencing factor is plain error." Defendant cited **People v. James**, 255 Ill. App. 3d 516 (1st Dist. 1993) for the proposition that the consideration of improper factors at sentencing is plain error.

The Appellate Court held that defendant waived his plain error argument on appeal by failing to "expressly argue, much less develop the argument that either prong of the doctrine is satisfied." The court also noted that the holding of **James**, that every sentencing error involving the consideration of improper factors is plain error, would swallow the rule of forfeiture. The Court thus declined to conduct a plain error analysis and affirmed defendant's sentence.

(Defendant was represented by Assistant Defender Allison Shah, Chicago.)

COLLATERAL REMEDIES

§§9-1(e)(1), 9-1(e)(2), 9-1(f)

People v. Allen, 2015 IL 113135 (No. 113135, 5/21/15)

1. At first-stage proceedings on a post-conviction petition, the court considers the petition's substantive merit rather than its compliance with procedural rules. The threshold to avoid summary dismissal is low, in recognition of the fact that many petitions are drafted by inmates without the assistance of an attorney. If a petition alleges sufficient facts to state the gist of a constitutional claim, first-stage dismissal is improper. A petition which presents legal points that are arguable on their merits may not be summarily dismissed.

Despite the low threshold to avoid first-stage dismissal, the *pro se* petitioner must supply a sufficient factual basis to show that the allegations in the petition are "capable of objective or independent corroboration." Thus, a petition must be accompanied by supporting evidence, which may include "affidavits, records, or other evidence." 725 ILCS 5/122-2.

A supporting affidavit is separate from a verification affidavit, which also must accompany the petition. 725 ILCS 5/122-1(b). The purpose of the verification affidavit is to confirm that the allegations are brought truthfully and in good faith.

In **People v. Collins**, 202 Ill. 2d 59, 782 N.E.2d 195 (2002), the court affirmed the first stage dismissal of a post-conviction petition which had a verification affidavit but lacked any supporting evidence. By contrast, in **People v. Hommerson**, 2014 IL 115638, the court concluded that it is improper to summarily dismiss a petition solely because it lacks a verification affidavit. Instead, if a petition alleges the gist of a constitutional violation, the lack of a verification affidavit should be raised by the State at the second-stage of the proceedings, after counsel has been appointed and had an opportunity to file an amended petition.

2. Defendant's *pro se* petition contained a signed statement by a person named Langford. The statement took responsibility for the offense and stated that defendant had not been involved. The statement asserted that it was made under penalty of perjury, and contained several fingerprints at the bottom. However, it was not notarized. In summarily dismissing the petition at the first stage, the trial court stated that the statement did not qualify as an "affidavit" because it had not been notarized.

The Supreme Court acknowledged that a statement is an "affidavit" only if it has been sworn before a person with legal authority to administer oaths. The lack of notarization of a supporting affidavit does not justify summary dismissal of the petition, however, because supporting evidence is not required to be in the form of an affidavit and the presence or absence of notarization does not prevent the trial court determining whether the "gist" standard for first stage proceedings is satisfied.

Thus, a petition may not be summarily dismissed solely for lack of notarization of an evidentiary affidavit. The court noted, however, that the State would be able to raise the lack of notarization of an evidentiary affidavit at second-stage proceedings if counsel was unable to obtain a properly notarized affidavit. At that time, the absence of notarization might be an adequate basis on which the trial court could dismiss the petition.

3. The court also found that the petition was not frivolous and patently without merit for reasons other than the lack of notarization of Langford's statement. Although the statement was "bare-bones," it was sufficient to show that the petition's allegations were subject to corroboration. The court criticized the trial court for evaluating credibility at the first stage instead of focusing on whether the petition set forth the gist of a constitutional issue.

The court noted that a petition claiming actual innocence based on newly discovered evidence must present supporting evidence that is new, noncumulative, material, and of such character as to change the result of the trial. However, the court found that there was no reason to believe that defendant could have obtained Langford's statement at an earlier date, even if he was aware of Langford's name at the time of

trial, where both defendant and Langford were incarcerated and Langford would presumably be reluctant to confess to a murder.

Because the petition made an adequate showing that evidence was available to support the petition's allegations, the trial court erred by ordering summary dismissal. The order was reversed and the cause remanded for second stage proceedings.

(Defendant was represented by Assistant Defender Brian McNeill, Chicago.)

§9-1(j)(1)

People v. Kuehner, 2015 IL 117695 (No. 117695, 5/21/15)

Where a *pro se* post-conviction petition has been advanced to second-stage proceedings on the basis of an affirmative determination by the trial court that the petition is neither frivolous nor patently without merit, appointed counsel may still move to withdraw from representation, but his motion to withdraw must contain at least some explanation as to why all of the claims in the *pro se* petition are so lacking in legal and factual support that counsel is compelled to withdraw.

Here, the trial court examined the merits of defendant's *pro se* petition, determined that it was neither frivolous nor patently without merit, and advanced the case to the second stage and appointed counsel to represent defendant. Counsel filed a motion to withdraw which addressed some but not all of claims in the *pro se* petition. Since the motion failed to address every claim, the Court reversed the judgment of the trial court allowing counsel to withdraw, and remanded the cause to the trial court for further second stage proceedings and the appointment of new counsel to represent defendant.

The Court distinguished the present case from **People v. Greer**, 212 Ill. 2d 192 (2004), where the Court upheld the trial court's decision to allow counsel to withdraw even though counsel's motion to withdraw failed to address every claim in the *pro se* petition. In Greer, unlike here, the petition advanced to the second stage based on the trial court's failure to rule on it within 90 days. The trial court thus never determined that the petition was neither frivolous nor patently without merit.

(Defendant was represented by Assistant Defender Kieran Wiberg, Chicago.)

CONFESSIONS

§§10-3(c), 10-5(c)(2)
In re D.L.H., Jr., 2015 IL 117341 (No. 117341, 5/21/15)

1. A person is in custody for **Miranda** purposes where the circumstances surrounding the interrogation would cause a reasonable person, innocent of wrongdoing, to believe that he was not at liberty to terminate the interrogation and leave. Courts look to several factors in making this determination: (1) the location, time, mood, and mode of questioning; (2) the number of officers present; (3) the presence of family and friends; (4) any indicia of a formal arrest procedure, such as the show of weapons or force, physical restraint, booking, or fingerprinting; (5) how the defendant arrived at the interrogation site; and (6) the age, intelligence, and mental makeup of the defendant. The reasonable person standard is modified to take account of a defendant's juvenile status.

The Court found that under the facts of this case, the nine-year-old defendant, who had significant intellectual impairments, was not in custody for purposes of **Miranda**. The interrogations took place in familiar surroundings - at the kitchen table of his home. Only one officer was present. He wore his service weapon but was not in uniform. And he used a conversational tone during the questioning. Defendant's father was present. The interrogations each lasted 30-40 minutes and took place in the early evening.

Defendant's age, intelligence and mental makeup favored a finding of custody, but was only one factor, and defendant did not ask the Court to adopt a bright-line rule that all nine-year-old defendants are necessarily and always in custody. The officer was unaware of defendant's intellectual impairments and the **Miranda** custody analysis does not require officers to consider circumstances that are unknowable to them. Accordingly, defendant was not in custody and **Miranda** warnings were not required.

2. In determining whether a statement is voluntary, courts consider the totality of the circumstances, including the characteristics of the defendant and the details of the interrogation. Defendant's characteristics include: age, intelligence, background, experience, mental capacity, education, and physical condition at the time of the questioning. Details of the interrogation include: legality and duration of the detention, duration of the questioning, provision of **Miranda** warnings, physical or mental abuse, threats or promises, and the use of trickery, deception, or subterfuge.

In the case of a juvenile, the presence of a concerned adult is a relevant factor, and "the greatest care must be taken to assure that the admission is voluntary." In light of these concerns, the Court viewed a defendant's age as a key factor in deciding whether statements were voluntary. Unlike the **Miranda** custody analysis, which considers a hypothetical reasonable juvenile, the voluntariness analysis asks whether the statements of a particular juvenile were voluntary.

Here defendant gave two statements after two separate interrogation sessions. The Court found that the first statement was voluntary, while the second statement was not.

At the time of the suppression hearing, the trial court had already found defendant unfit to stand trial since he was unable to understand the nature and purposes of the proceedings or assist in his defense. The expert who interviewed defendant and prepared a fitness report concluded that defendant's cognitive abilities were only at the seven-to-eight year-old level. The Court found that these characteristics of defendant would "color the lens" through which it would view the circumstances of the interrogations.

3. Concerning the first interrogation and statement, the Court found that despite defendant's young age and "even younger mental age," the statement was voluntary. The questioning was non-custodial, of short duration, and was conducted in a conversational and non-accusatory manner. The officer made no threats and his questions did not suggest answers. Defendant's father was at his side and provided "sage advice" about not making any admissions.

4. The Court, however, found that the second statement was not voluntary. Before the second interrogation began, the officer asked defendant's father to move away from the kitchen table where the interrogation was taking place. Although the officer continued using a conversational tone, he gave two long monologues designed to play on defendant's fear that his father or other relatives would go to jail, and falsely assured defendant that no consequences would attach to an admission of guilt. Although an adult might have been left "cold and unimpressed" by the officers tactics, the Court found that a nine-year-old with defendant's level of intellectual functioning would have been far more vulnerable to these tactics.

The Court suppressed the second statement and remanded the cause to the Appellate Court to conduct a harmless error analysis on the erroneous admission of that statement.

COUNSEL

§§13-1(b), 13-4(b)(7)

People v. Lewis, 2015 IL App (1st) 130171 (No. 1-13-0171, 5/12/15)

1. Defendant's Sixth Amendment right to counsel did not attach when he was arrested and arraigned for extradition proceedings in Nevada pursuant to an Illinois arrest warrant. Extradition is a summary ministerial procedure designed to return a fugitive to another State so he may stand trial. An extradition hearing does not commence adversary proceedings and is not a critical stage for Sixth Amendment purposes.

The Court rejected defendant's argument that the extradition hearing was a critical stage because the State at that point committed itself to prosecution. Although defendant was brought before a judicial officer during the hearing, the State had not yet charged him with a crime. The only purpose of the hearing was to transfer defendant to Illinois pursuant to an arrest warrant. Because defendant was not formally charged until he was returned to Illinois and identified in a lineup, the extradition hearing did not entail adversary proceedings against him.

The denial of the motion to suppress lineup identification was affirmed.

2. Trial counsel's closing argument fell below an objective standard of reasonableness under the first prong of **Strickland** where he compared the reasonable doubt standard to a football game. Counsel first stated that in a civil case, with a preponderance of the evidence standard "they have to take it past the 50 yard line." But in a criminal case, "it's beyond a reasonable doubt, so it's beyond the 50 yard line. You have to take it to the opponents 20, the red zone. You got to get it in the red zone for beyond a reasonable doubt."

But defendant suffered no prejudice because there was overwhelming evidence of guilt and the jury instructions following closing arguments cured any potential confusion regarding the meaning of reasonable doubt.

Defendant's conviction was affirmed.

§§13-1(e), 13-2

People v. Brzowski, 2015 IL App (3rd) 120376 (No. 3-12-0376, 3-12-0477, 5/18/15)

1. A criminal defendant has the right to representation by counsel at every critical stage of the proceeding. In addition, an indigent defendant has the right to have counsel appointed. A defendant has the right to represent himself, but only if he voluntarily, knowingly and intelligently waives counsel.

Supreme Court Rule 401(a) requires that any waiver of counsel occur in open court and be preceded by trial court admonishments concerning the nature of the charge, the minimum and maximum sentences, and the rights to representation by counsel and to have counsel appointed if indigent. Only substantial compliance with Rule 401(a) is required.

Requiring a *pro se* defendant to accept standby counsel does not constitute a wavier under Rule 401(a). Thus, Rule 401(a) admonitions are not required where standby counsel is present at all times during the trial. However, Rule 401(a) admonitions must be given if standby counsel is absent at any critical stage of the proceeding.

2. Defendant chose to proceed *pro se* at the first of two trials for separate violations of a protective order, but the trial court appointed standby counsel who was then dismissed before jury deliberations. As a matter of plain error, the court found that once standby counsel was dismissed, defendant lacked counsel during a critical stage of his trial. At that point, Rule 401(a) admonitions were required.

The court also concluded that the trial court abused its discretion by dismissing defendant's standby counsel before the trial was concluded. A trial judge has discretion to appoint standby counsel for a *pro se* defendant, and also has discretion to decide the nature and extent of standby counsel's involvement. However, the court "may not place a new restriction or limitation on standby counsel that was not set out from the beginning of the trial." The trial court abuses its discretion and causes prejudice if it allows a defendant to represent himself with the assistance of standby counsel, but at crucial phases of the trial refuses reasonable requests for standby counsel's assistance.

3. At the trial for the second of the alleged violations, defendant asked to be represented by the Assistant Public Defender who had acted as standby counsel at the first trial. The trial court denied this request, stating that the Public Defender's Office refused to have anything to do with defendant's case. In fact, the Public Defender had no objection to being appointed if defendant accepted representation by the attorney who had acted as standby counsel.

One week later, defendant renewed his request for representation by the Public Defender's Office and was again refused. Defendant was told that he could represent himself, hire counsel, or find an attorney who would represent him for free. Defendant represented himself at the second trial without the assistance of counsel. No Rule 401(a) admonitions were given at any time during the second trial.

The Appellate Court concluded that the trial court erred by failing to give Rule 401(a) admonishments before the second trial. The court rejected the State's argument that there was substantial compliance with Rule 401(a) because defendant's responses during a pretrial fitness evaluation showed that he understood the charges and the sentence he could receive if convicted.

First, the questions during the fitness evaluation were asked by a psychiatrist. Under Rule 401(a), any waiver of the right to counsel must take place in open court.

Second, the questions asked during the fitness evaluation were designed only to determine fitness to stand trial. Where the defendant seeks to waive counsel, the trial court must determine whether the waiver is knowing and voluntary.

Third, one purpose of Rule 401(a) is to notify defendant of the possible dangers of self-representation. The questions asked during the fitness examination were not designed to serve this purpose.

Fourth, Rule 401(a) requires that the defendant be admonished that he has the right to counsel and to appointed counsel if he is indigent. Defendant was never given such information here, and in fact was erroneously told by the trial court he was not entitled to appointed counsel. Under these circumstances, plain error occurred because defendant was allowed to represent himself at the second trial without receiving Rule 401(a) admonitions.

(Defendant was represented by Assistant Defender Jeffrey Svehla, Chicago.)

§13-2

People v. Wright, 2015 IL App (1st) 123496 (No. 1-12-3496, 5/21/15)

1. Under Supreme Court Rule 401(a)(2), the trial court must admonish a defendant who wishes to waive counsel about the minimum and maximum sentences he faces. Substantial compliance with Rule 401 is sufficient to effectuate a valid waiver of counsel if the record shows that the waiver was knowing and voluntary and the admonitions did not prejudice defendant. A deficient admonishment does not prejudice a defendant where (1) the defendant already knows of the omitted information or (2) his degree of legal sophistication makes evident his awareness of the omitted information.

The Appellate Court found that the trial court failed to substantially comply with Rule 401. When defendant asked to waive counsel, the trial court admonished him that he faced a sentence of 60 years imprisonment. At sentencing, however, the State informed the trial court that because of his previous criminal history, defendant actually faced a sentence of 75 years imprisonment. Based on the "clear and unambiguous language" of Rule 401, the trial court's incorrect admonitions concerning defendant's sentence "compels the conclusion that defendant did not make a knowing and voluntary waiver of his right to counsel."

2. The Court rejected the State's argument that the trial court's improper admonitions did not prejudice defendant because he was ultimately sentenced to 50 years imprisonment, well below the 60-year sentence stated in the admonitions. The purpose of Rule 401 is to ensure that the waiver of counsel is knowing and voluntary. Regardless of the sentence actually imposed, the Court could not say for certain that defendant would have waived counsel had he known that he was facing 75 years in prison. Finding otherwise would mean that a reviewing court could speculate about whether defendant would have waived counsel, "effectively taking the decision to waive counsel out of the hands of the defendant."

Moreover, the State's position did not fall within either of the two limited exceptions where a deficiency in the admonitions does not prejudice a defendant: (1) defendant already knows of the omitted information; or (2) his degree of legal sophistication makes evident his awareness of the omitted information.

3. The Court also rejected the State's argument that defendant's legal sophistication in this case made it clear he knew of the omitted information. Although defendant appeared to possess a somewhat high degree of legal sophistication, simply because he intelligently argued his case did not mean he knew about the correct sentencing range.

The Court reversed defendant's conviction and remanded the case for a new trial.

(Defendant was represented by Assistant Defender Pete Sgro, Chicago.)

§13-4(a)(3)

People v. Flemming, 2014 IL App (1st) 111925-B (No. 1-11-1925, 5/1/2015)

1. When a defendant alleges his counsel's ineffectiveness in a *pro se* motion for a new trial, the court should conduct a **Krankel** hearing to examine the factual matters underlying defendant's claim to determine whether new counsel should be appointed. **People v. Krankel**, 102 Ill. 2d 181 (1984); **People v. Nitz**, 143 Ill. 2d 82 (1991).

The operative concern in a **Krankel** hearing is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations. If the court determines that the claims lack merit it does not need to appoint new counsel. If the court finds that the claims show possible neglect, the case proceeds to the second step in a **Krankel** hearing, an adversarial proceeding in which new counsel must be appointed to represent defendant on his claim of ineffectiveness.

2. Here, defendant made an oral *pro se* motion alleging that his counsel was ineffective for failing to present evidence supporting his theory of defense. After hearing defendant's allegations, the court did not directly question or otherwise interact with defense counsel. Instead, the court directed the prosecutor to question defense counsel about defendant's allegations. After hearing defense counsel's answers, the court denied defendant's motion.

On appeal, defendant argued that the trial court failed to conduct a proper judicial inquiry "one-on-one style" with defendant and counsel, and instead conducted a full-blown adversarial hearing where defendant had no representation. Defendant argued that the trial court improperly compressed the two steps in a **Krankel** hearing but failed to properly execute either of them.

3. The Appellate Court rejected defendant's argument that the prosecutor's questioning of defense counsel was a full-blown second-stage adversarial hearing. The questioning was conducted at the court's direction, was very brief, and directed solely at answering defendant's allegations. Such questioning was clearly a preliminary inquiry

designed to give the court information about defendant's claims in order to decide whether new counsel should be appointed.

Additionally, the fact that the trial court did not personally question defense counsel did not make this an improper hearing. There is no set format for conducting the initial inquiry in a **Krankel** hearing. Some interchange between the court and counsel is permissible and usually necessary, but the trial court's method of inquiry is somewhat flexible.

4. But, if the State's participation during the preliminary inquiry is anything more than *de minimis*, there is an unacceptable risk that the inquiry will become an improper adversarial proceeding with both the State and trial counsel opposing defendant. The purpose of **Krankel** is best served by having a neutral trier of fact evaluate the claims without the State's adversarial participation. When the State questions defendant's trial counsel in a manner contrary to defendant's allegations, the State's participation is not *de minimis* and is reversible error. **People v. Jolly**, 2014 IL 117142.

Here, although the State's participation was minimal, its questioning of defense counsel tended to counter defendant's allegations. Such questioning was contrary to the intent of a preliminary **Krankel** inquiry and was reversible error.

The case was remanded for a new preliminary **Krankel** hearing before a different trial judge and without the State's adversarial participation.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

§13-4(b)(2)

People v. Valdez, 2015 IL App (3rd) 120892 (No. 3-12-0892, 5/19/15)

1. Under **Padilla v. Kentucky**, 559 U.S. 356 (2010), the Sixth Amendment right to effective assistance of counsel requires that counsel advise a guilty plea defendant concerning any potential immigration consequences that may result from the conviction. **Padilla** established a two-tier standard for determining the extent of counsel's duty to advise about immigration issues. Where the immigration consequences of a plea are uncertain, counsel need only advise the client that the plea "may carry a risk of adverse immigration consequences." By contrast, where the immigration consequences of a particular plea are "succinct, clear, and explicit," counsel must advise the client of those specific consequences.

Here, the defendant's guilty plea to residential burglary predicated on theft exposed him to deportation on the ground that the conviction constituted a crime involving moral turpitude. Such crimes are deportable under 8 U.S.C. §1227(a)(2)(A)(i). The court concluded that federal case law clearly indicated that the offense to which

defendant was pleading was deportable, and that with minimum research counsel could have discovered the applicable law. Under these circumstances, counsel's failure to advise defendant that the plea would make him deportable was unreasonable and satisfied the first prong of **Strickland**.

The court rejected the State's argument that the immigration consequences of a conviction are clear only if the text of the immigration statute itself explicitly declares that a particular conviction is deportable. The court found that where a minimal investigation of case law makes it clear that a conviction will result in deportation, the second-tier duty under **Padilla** applies.

2. To establish ineffective assistance of counsel, defendant must show not only that his attorney acted unreasonably but also that prejudice resulted. Prejudice is defined as a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. In the context of a guilty plea, the defendant must assert either a claim of actual innocence or a plausible defense that could have been raised at trial.

Where defendant claimed in his motion to withdraw the plea that he would not have pleaded guilty had he known that deportation would result, and also asserted that he was actually innocent of the charge, he satisfied the prejudice requirement for showing that he received ineffective assistance of counsel in regards to his plea.

3. The court rejected the argument that the trial judge's admonishments under 725 ILCS 5/113-8 cured counsel's failure to advise defendant of the immigration consequences of the plea. Section 113-8 requires the trial court to advise a guilty plea defendant that if he or she is not a U.S. citizen, the conviction may result in deportation, exclusion from admission to the United States, or denial of naturalization.

The Appellate Court found that the §113-8 admonishments mirror the advice counsel is required to give when the immigration consequences of a plea are uncertain and counsel need only inform defendant that the plea "may carry a risk of adverse immigration consequences." Thus, where the immigration consequences are unclear, §113-8 admonishments may cure the prejudice resulting from defense counsel's failure to comply with **Padilla**.

Here, however, defendant faced an explicit risk of deportation. Under **Padilla**, counsel was required to advise defendant concerning the specific immigration consequences of the plea. Under these circumstances, the trial court's general admonishments under §113-8 were insufficient to cure the prejudice from counsel's failure to give explicit advice concerning the likelihood that defendant would be deported.

4. In a concurring opinion, Justice Holdridge found that where the error in question concerns a failure to advise a defendant under **Padilla**, the defendant is not required to make a claim of actual innocence or show that he had a plausible trial defense in order to establish prejudice. Instead, defendant should be allowed to withdraw the plea if it

would have been rational to reject the plea bargain. Justice Holdridge stressed that a defendant facing potential deportation may elect to reject a plea offer and go to trial even where there is little chance of an acquittal, because he or she may rationally fear being deported more than the risk of a lengthy prison sentence.

Justice Holdridge also noted that because the President and Attorney General have stated that the executive has authority to decline to follow deportation statutes, the immigration consequences of a guilty plea may never be sufficiently clear or explicit to trigger counsel's duty under the second tier of **Padilla**.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

EVIDENCE

§19-24(a)

People v. Torres, 2015 IL App (1st) 120807 (No. 1-12-0807, 5/27/15)

When the State seeks to admit evidence of prior acts of domestic violence under section 115-7.4, "it must disclose the evidence, including statements of witnesses or a *summary of the substance of any testimony*, at a reasonable time in advance of trial." 725 ILCS 5/115-7.4(c) (emphasis added). The term "summary" is not defined.

Defendant argued that the State provided an inadequate summary in its motion in limine to introduce evidence of prior acts of domestic violence, and thus prevented the trial court from properly analyzing the evidence and defendant from adequately opposing its admission.

As a matter of first impression, the Appellate Court held that the term "summary" involves "something less than a full disclosure of every detail of a witness's testimony," and "need not contain all that is required by an offer of proof." Here, the State's motion in limine provided details as to time, place, the victim, and the acts committed by defendant. The Court thus found no error in admitting the prior acts, and affirmed defendant's convictions.

(Defendant was represented by former Assistant Defender Carson Griffis, Chicago)

FITNESS TO STAND TRIAL

Ch. 21

People v. Edwards, 2015 IL App (3d) 130190 (No. 3-13-0190, 5/6/15)

Under 725 ILCS 104-13(a), when a fitness issue involves defendant's mental state, the court shall order a fitness examination.

Here, the trial court signed an order drafted by defense counsel which stated:

> This matter coming on for a hearing on defendant's motion for expert witness and for fitness hearing, and for other relief, said motion being uncontested by the [State], and the Court finding that a bonafide doubt exist [sic] as to Defendant's fitness to stand trial under 725 ILCS 5/104-13.

An expert examined defendant and filed a report finding him fit to stand trial, but the trial court never conducted a fitness hearing. Defendant argued that the trial court erred in failing to conduct a fitness hearing after it signed an order finding a *bona fide* doubt of his fitness.

The Appellate Court rejected defendant's argument. In **People v. Hanson**, 212 Ill. 2d 212 (2004), the Supreme Court held that the grant of a defense motion for a psychological evaluation, without more, does not show that the trial court found a *bona fide* doubt of defendant's fitness. Here, defendant filed a motion pursuant to 104-13(a) requesting the trial court to appoint a qualified expert. Although the order signed by the trial court contained the language "*bona fide* doubt," it was defendant who drafted the order. The record provided no "indication whatsoever" that the court or State agreed with defense counsel, or raised their own *bona fide* doubt.

Under these circumstances, defendant merely requested an expert evaluation and there was no error in proceeding to trial without a fitness hearing.

The dissenting justice would have found that the trial court's explicit finding of a *bona fide* of defendant's fitness, as clearly stated in its written order, required the trial court to hold a fitness hearing.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

Ch. 21

People v. Gipson, 2015 IL App (1st) 122451 (No. 1-12-2451, 5/27/15)

Where a defendant has been previously found unfit to stand trial, a presumption exists that he remains unfit until he is found fit at a valid fitness restoration hearing. At the conclusion of the hearing, the court may: (1) find defendant fit; (2) find the evidence insufficient to show that defendant's's fitness has been restored; or (3) seek additional information.

Fitness for trial involves a fundamental right and thus alleged errors concerning fitness may be reviewed as plain error. Although defendant failed to preserve the issue here, the Appellate Court reviewed it as plain error.

At the fitness restoration hearing in this case, the parties stipulated to the reports of two experts, Drs. Kelly and Wahlstrom. Dr Kelly concluded that defendant was fit to stand trial. Dr. Wahlstrom concluded that defendant was "marginally" fit to stand trial with medication. The trial court relied equally on both experts' opinions and found defendant fit to stand trial.

The Appellate Court reversed the trial court's finding. It noted that a defendant may only be found fit, fit with medication, or unfit. Dr. Wahlstrom's opinion, on which the trial court gave great weight, found defendant "marginally" fit. But Illinois recognizes no such qualification to a defendant's fitness. Accordingly, the trial court had an obligation to seek more information in order to understand what Dr. Wahlstrom meant by "marginally" fit.

The Appellate Court was also troubled by the trial court's statement that Dr. Wahlstrom "could not rule out" that defendant was fit to stand trial. The presumption of a restoration hearing is that defendant is unfit. The trial court must therefore "rule out the possibility that defendant was still unfit."

The case was remanded for a retrospective fitness hearing.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

GUILTY PLEAS

§24-8(b)(2)

People v. Scarbrough, 2015 IL App (3d) 130426 (No. 3-13-0426, 5/13/15)

Under Supreme Court Rule 604(d), defendant's counsel must file a certificate stating that he has consulted with defendant to ascertain his contentions of error in the sentence *or* the entry of the guilty plea. In **People v. Tousignant**, 2014 IL 115329,

however, the Supreme Court held that in interpreting counsel's duties under Rule 604(d), "or" means "and," and thus counsel has a duty to consult with his client about both the sentence and the entry of the guilty plea.

Defendant entered a blind plea and after sentencing filed a motion to reduce sentence. At the hearing on the motion, counsel filed a 604(d) certificate stating that she had consulted with defendant to ascertain his "contentions of error in the sentence or the entry of a plea of guilty in this matter."

On appeal, defendant argued that his case should be remanded for further post-plea proceedings since counsel failed to comply with Rule 604(d) by failing to certify that she consulted with him about the contentions of error in both the sentence *and* the entry of the guilty plea. The Appellate Court agreed that the certificate failed to comply with Rule 604(d) but found that no remand was needed.

The Court first noted that **Tousignant** did not control the outcome of this case. Although **Tousignant** addressed counsel's actual duties, and required counsel to consult with defendant about the sentence and the guilty plea, it did directly address the issue presented here about what needs to be stated in the certificate. And since the Supreme Court did not make any change to the rule itself after **Tousignant**, the rule itself continues to use the "or" language.

Nevertheless, the Court did not believe it was enough to simply recite verbatim the language of the rule, as counsel did here. Instead, **Tousignant** demonstrated a need for counsel to specify what she had actually done to comply with the rule. Counsel's certificate, which merely tracked the language of the statute and stated that she had consulted with defendant about the sentence *or* the guilty plea, was insufficiently precise and technically non-compliant. But since defendant had no objections to the entry of his guilty plea and only raised an issue about a "technical semantic defect" in the certificate, the Court rejected his request for remand.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa)

HOME INVASION

Ch. 25

People v. Booker, 2015 IL App (1st) 131872 (No. 1-13-1872, 5/12/15)

Defendant was charged with several offenses including home invasion while armed with a firearm. Following a bench trial, he was convicted of home invasion while armed with a dangerous weapon other than a firearm. In announcing its verdict, the trial court stated that the conflicting evidence failed to establish that the weapon in question was a firearm.

1. The Appellate Court held that defendant was improperly convicted of home invasion while armed with a dangerous weapon other than a firearm. A defendant may not be convicted of an uncharged crime unless it is a lesser-included offense of the charged crime and the evidence at trial rationally supports a conviction for the lesser offense and an acquittal of the greater offense. To determine whether an uncharged crime is a lesser-included offense, the court looks to the allegations in the charging instrument to determine whether the description of the greater offense contains the broad foundation or main outline of the lesser offense.

Noting that the home invasion statute places committing the offense "with a firearm" or "with a dangerous weapon other than a firearm" in different subsections, the court concluded that the former offense necessarily excludes the latter offense. Thus, an allegation that defendant was armed with a dangerous weapon other than a firearm cannot be reasonably inferred from the allegation that he was armed with a firearm.

Because the information charging defendant with home invasion while armed with a firearm did not state the broad foundation or main outline of home invasion while armed with a dangerous weapon other than a firearm, the latter offense was not a lesser-included offense. The trial therefore erred by convicting defendant of the uncharged offense of home invasion with a dangerous weapon other than a firearm.

2. The court reached the issue as plain error under the second-prong of the plain error rule.

The convictions and sentences for home invasion while armed with a dangerous weapon were reversed and the cause remanded for re-sentencing on the remaining convictions.

HOMICIDE

§26-3

People v. Brown, 2015 IL App (1st) 131873 (No. 1-13-1873, 5/29/15)

1. The offense of attempt is committed where, with intent to commit a specific offense, an individual performs any act which constitutes a substantial step toward the commission of that offense. To prove attempt murder, the State must establish beyond a reasonable doubt that the defendant acted with specific intent to kill. Intent can be established by proof of surrounding circumstances, including the character of the assault, the use of a deadly weapon, or other matters from which intent to kill may be inferred.

2. The court concluded that even viewing the evidence in a light most favorable to the State, there was insufficient evidence to prove beyond a reasonable doubt that defendant intended to kill his live-in girlfriend. The defendant cut the girlfriend four

times in the back with a knife or other sharp instrument, but there was no evidence of any struggle before or after the attack or of threats by the defendant toward the complainant. Furthermore, the lacerations were superficial and not life threatening. In addition, when the complainant left the apartment, the defendant did not attempt to pursue her or cause any further injury. Finally, the complainant testified only that she felt "punching" and "pressure" on her back and did not know that she had been cut until she felt something moist running down her back.

Although the complainant suffered serious injuries that could have resulted in permanent scarring, not every assault involving serious bodily injury necessarily supports an inference that the assailant intended to kill. Defendant's conviction for attempt first degree murder was reversed and the cause remanded for re-sentencing on the remaining counts.

(Defendant was represented by Assistant Defender Tonya Joy Reedy, Chicago.)

IDENTIFICATION

§27-2

People v. Lewis, 2015 IL App (1st) 130171 (No. 1-13-0171, 5/12/15)

Defendant's Sixth Amendment right to counsel did not attach when he was arrested and arraigned for extradition proceedings in Nevada pursuant to an Illinois arrest warrant. Extradition is a summary ministerial procedure designed to return a fugitive to another State so he may stand trial. An extradition hearing does not commence adversary proceedings and is not a critical stage for Sixth Amendment purposes.

The Court rejected defendant's argument that the extradition hearing was a critical stage because the State at that point committed itself to prosecution. Although defendant was brought before a judicial officer during the hearing, the State had not yet charged him with a crime. The only purpose of the hearing was to transfer defendant to Illinois pursuant to an arrest warrant. Because defendant was not formally charged until he was returned to Illinois and identified in a lineup, the extradition hearing did not entail adversary proceedings against him.

The denial of the motion to suppress lineup identification was affirmed.

INDICTMENTS, INFORMATIONS, COMPLAINTS

§29-6

People v. Lutter, 2015 IL App (2d) 140139 (No. 2-14-0139, 5/18/15)

1. The statute of limitations for a misdemeanor is generally six months. When the charge shows on its face that the offense was not committed within the applicable limitations period, an element of the State's case is to allege and prove the existence of some fact which invokes an exception to the statute of limitations. See **People v. Morris**, 135 Ill. 2d 540, 554 N.E.2d 150 (1990).

The court concluded that where the information "vaguely alleged facts" that might arguably toll the statute of limitations, but the State offered no evidence of those facts during trial, defendant's motion for acquittal should have been granted. Under **Morris**, the State had the burden to both allege and prove facts which would extend the statute of limitations.

2. Because an exception to the statute of limitations was an element of the State's case, defendant did not forfeit the issue by failing to make a pretrial motion to dismiss the information. Due process prohibits requiring a defendant to move to dismiss a charge on which the State failed to prove an element, because the burden of establishing all of the elements of the State's case cannot be shifted to the defense.

The court distinguished this case from one where the charge does not allege that the offense was outside the statute of limitations and that an exception to the limitations period applied. In that situation, the defendant can only raise the issue by filing a motion to dismiss. By contrast, where the State alleges in the charge that there is an exception to the statute of limitations, that exception becomes an element of the State's case and must be proven.

JURY

§§32-3(a), 32-3(b)

People v. Hollahan, 2015 IL App (3rd) 130525 (No. 3-13-0525, 5/6/15)

Generally, when a judgment is vacated or reversed either on appeal or in the trial court and a new trial is ordered, the defendant's right to a jury trial is restored for the new trial. As a matter of first impression, the Appellate Court held that the general rule does not apply where the defendant enters a jury waiver that is not part of a plea agreement, subsequently pleads guilty, and is then granted leave to withdraw the plea. Thus, defendant was properly tried in a bench trial where he waived a jury about a month before he entered a guilty plea and was subsequently granted leave to withdraw the plea.

(Defendant was represented by Assistant Defender Santiago Durango, Ottawa.)

§32-8(i)

People v. Booker, 2015 IL App (1st) 131872 (No. 1-13-1872, 5/12/15)

Defendant was charged with several offenses including home invasion while armed with a firearm. Following a bench trial, he was convicted of home invasion while armed with a dangerous weapon other than a firearm. In announcing its verdict, the trial court stated that the conflicting evidence failed to establish that the weapon in question was a firearm.

1. The Appellate Court held that defendant was improperly convicted of home invasion while armed with a dangerous weapon other than a firearm. A defendant may not be convicted of an uncharged crime unless it is a lesser-included offense of the charged crime and the evidence at trial rationally supports a conviction for the lesser offense and an acquittal of the greater offense. To determine whether an uncharged crime is a lesser-included offense, the court looks to the allegations in the charging instrument to determine whether the description of the greater offense contains the broad foundation or main outline of the lesser offense.

Noting that the home invasion statute places committing the offense "with a firearm" or "with a dangerous weapon other than a firearm" in different subsections, the court concluded that the former offense necessarily excludes the latter offense. Thus, an allegation that defendant was armed with a dangerous weapon other than a firearm cannot be reasonably inferred from the allegation that he was armed with a firearm.

Because the information charging defendant with home invasion while armed with a firearm did not state the broad foundation or main outline of home invasion while armed with a dangerous weapon other than a firearm, the latter offense was not a lesser-included offense. The trial therefore erred by convicting defendant of the uncharged offense of home invasion with a dangerous weapon other than a firearm.

2. The court reached the issue as plain error under the second-prong of the plain error rule.

The convictions and sentences for home invasion while armed with a dangerous weapon were reversed and the cause remanded for re-sentencing on the remaining convictions.

JUVENILE PROCEEDINGS

§§33-3, 33-9

People v. Richardson, 2015 IL 118255 (No. 118255, 5/21/15)

The right to equal protection guarantees that similarly situated individuals will be treated in a similar manner unless the State can demonstrate an appropriate reason to treat them differently. When a legislative classification does not affect a fundamental right or discriminate against a suspect class, courts apply a rational basis scrutiny and consider whether the classification bears a rational relationship to a legitimate governmental purpose.

The State charged defendant, who was 17 years old at the time of the offenses, as an adult with criminal sexual assault and criminal sexual abuse. At the time of the offenses, the Juvenile Court Act only applied to minors under 17 years of age. The Act was subsequently amended to apply to minors under the age of 18. The amendment included a savings clause that made the changes in the statute applicable to offenses that occurred on or after the effective date of the amendment. 705 ILCS 405/5-120.

Defendant argued that the savings clause violated equal protection because he was similarly situated to 17-year-olds who committed offenses on or after the amendment's effective date, and there was no rational basis to treat him differently.

The Court rejected defendant's argument. It held that the legislative classification in the savings clause was rationally related to the legislature's goal of including 17-year-olds within the jurisdiction of the Juvenile Court Act. By limiting the amendment to offenses committed on or after the effective date, both defendants and courts are on notice as to whether the Act will apply. The savings clause also ensures that cases already in progress would not have to restart in juvenile court and defendants could not manipulate or delay proceedings to take advantage of the amendment.

The Court reversed the trial court's judgment declaring the savings clause unconstitutional as applied to defendant and remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

§33-6(d)

People v. Edwards, 2015 IL App (3d) 130190 (No. 3-13-0190, 5/6/15)

Defendant, who was 17 years old at the time of the offense, was convicted of first degree murder and attempt murder. Because of firearm add-ons, the minimum sentences applicable in this case were 45 years for murder and 31 years for attempt murder, and since the sentences were required to be served consecutively, the total mandatory

minimum was 76 years. The court sentenced defendant to consecutive terms of 50 years for murder and 40 years for attempt murder, for a total of 90 years.

Defendant argued that his 76-year mandatory minimum sentence was unconstitutional under **Miller v. Alabama**, 132 S.Ct. 2455 (2012). The Appellate Court disagreed. Defendant's sentence of 90 years was 14 years over the mandatory minimum, and the Court found no authority allowing a defendant to argue that a sentence he did not actually receive was unconstitutional.

Moreover, **Miller** did not hold that a juvenile could never be sentenced to life imprisonment. It instead held that a mandatory sentence of life imprisonment was unconstitutional since the court had no discretion to consider mitigating factors. Here, the trial court sentenced defendant to a term of imprisonment above the mandatory minimum, and thus **Miller** did not apply.

Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

§33-6(d)

People v. Gipson, 2015 IL App (1st) 122451 (No. 1-12-2451, 5/27/15)

1. Defendant, who was 15 years old at the time of the offense, was automatically transferred to adult court and convicted of two counts of attempt first-degree murder. The facts at trial showed that defendant approached the driver's side of a car where two victims were sitting and fired shots at one of the victims, hitting him once. At the same time, the co-defendant approached the passenger side of the car and fired shots at the other victim, hitting him several times.

The trial court found that the 20-year enhancement applied to both of defendant's convictions under 720 ILCS 5/8-4(c)(1)(C), requiring that 20 years be added to the sentence where the defendant "personally discharged a firearm" during the commission of the offense. The court imposed the minimum sentence of 26 years (including the 20-year firearm enhancement) for both convictions, to be served consecutively for a total of 52 years.

2. Defendant argued that the automatic transfer statute combined with the sentencing provisions violated the Eighth Amendment as applied to him. The Court rejected this argument, holding that defendant's 52-year sentence was not a *de facto* sentence of life imprisonment. Taking into account available sentencing credit, the Court determined that defendant could be released from prison at age 60, while the average life expectancy for someone in his position was 67.8 years. Defendant thus could, and likely would, spend the last several years of his life outside of prison. The Court found

that, strictly speaking, defendant's sentence did not constitute life imprisonment and thus did not violate the Eighth Amendment.

3. The Court agreed, however, that the statutory scheme was unconstitutional as applied to defendant under the proportionate penalties clause of the Illinois Constitution. The Illinois Constitution states that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. To show a violation of the clause, a defendant must show that the penalty is degrading, cruel "or so wholly disproportionate to the offense that it shocks the moral sense of the community." The clause provides a limitation on punishment beyond the eighth amendment.

The Court found that defendant's penalty shocked the moral sense of the community. Although this was a serious offense, and one of the victims suffered severe injuries, there were numerous factors that diminished "the justification for a 52-year prison term." The incident was not planned long before it occurred, but was instead the result of rash decision making. Defendant was a mentally ill juvenile who was prone to impulsive behavior, and wanted to impress his older co-defendant. And defendant did not personally inflict serious harm, even though that was primarily the result of bad aim.

The court found it meaningful that defendant had been found unfit to stand trial and thus was clearly not "at his peak mental efficiency" when the offense occurred. Defendant's inability to process information may have affected his judgment, which diminished his culpability and the need for retribution. At the same time, defendant's mental health had improved in the recent past, showing he may yet be rehabilitated. And the trial judge clearly would have imposed a shorter sentence if that had been possible. The Court found it "unsettling" that the trial court's discretion in sentencing a juvenile was frustrated by the mandatory minimum in the case. "Under these circumstances, defendant's sentence shocks the conscience and cannot pass constitutional muster."

As a remedy, the court ordered the trial court on remand to impose any appropriate Class X sentence without the mandatory firearm enhancement.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

§33-6(d)

People v. Reyes, 2015 IL App (2d) 120471 (No. 2-12-0471, 5/6/15)

Defendant, who was 16 years old at the time of the offense, was convicted of first degree murder and two counts of attempt first degree murder. He was sentenced 45 years imprisonment for first degree murder and 26 years for each count of attempt murder,

all sentences to run consecutively for a total of 97 years. Defendant would have to serve 89 years of that term and would not be eligible for MSR until he was 105 years old.

Defendant argued that his 97-year sentence was a *de facto* natural life sentence that would be unconstitutional under **Miller v. Alabama**, 132 S.Ct. 2455 (2012). The Appellate Court disagreed, declining to extend **Miller** to this case. Unlike the **Miller** defendants, who were sentenced to natural life without the possibility of parole based on single murder convictions, here defendant received consecutive sentences based on multiple counts and multiple victims. Moreover, "defendant did not receive the most severe of all possible penalties, such as the death penalty or life without the possibility of parole."

Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Kathy Hamill, Elgin.)

§33-9

In re Maurice D., 2015 IL App (4th) 130323 (No. 4-13-0323, 5/29/15)

Reiterating Illinois Supreme Court precedent, the Appellate Court rejected arguments that the Eighth Amendment and the proportionate penalties clause are violated where a minor is prosecuted for an imprisonable misdemeanor offense based on engaging in "consensual" sexual activity with a close-in-age minor. The court concluded that because a petition for adjudication of wardship is neither criminal in nature nor a direct action by the State to inflict punishment, the Eight Amendment and the proportionate penalties clause do not apply.

The court also concluded that substantive due process is not violated because such prosecutions are rationally related to the legitimate state purpose of protecting 13 to 16-year-olds from premature sexual experiences.

The court noted, however, that the Illinois Juvenile Justice Commission recently recommended that juveniles be removed from the sex-offender registry and that Illinois stop imposing categorical registration requirements upon juveniles.

(Respondent was represented by Assistant Defender Janieen Terrance, Springfield.)

NARCOTICS

§§35-1, 35-3(a)
People v. Chatha, 2015 IL App (4th) 130652 (No. 4-13-0652, 5/29/15)

Defendant, a convenience store owner, was convicted of possession of a controlled substance with intent to deliver after his store clerk sold a commercially packaged product which contained AM-2201 (synthetic cannabis). Defendant testified that when Illinois law changed to prohibit the sale of certain products, he took those products out of his stores. He was then asked by customers why he did not stock Bulldog Potpourri, which the customers said was being sold by a tobacco store in Bloomington.

After talking to an employee of the tobacco store and a supplier who claimed that the potpourri did not contain any synthetic drug, defendant began to sell the product in his stores. The packaging for the potpourri stated that it "did not contain any illegal substances" and "was not for human consumption."

Defendant was charged after an informant purchased the product, which was kept beneath the counter. Defendant testified that he kept the product beneath the counter so that the cashier, who was the only employee in the store, would not have to walk back and forth from the glass display case every time a sale was made.

The Appellate Court found that the evidence was insufficient to establish guilt beyond a reasonable doubt.

1. To convict of possession of a controlled substance with intent to deliver, the State must prove that the defendant had knowledge of the presence of the substance, had possession or control of the substance, and intended to deliver the substance. There was no question that defendant sold the product, and the only issue was whether he knew that the potpourri contained a controlled substance. The court noted that the statute defining the offense (720 ILCS 570/401(c)(11)) described the controlled substance by its molecular composition, and stated that "we doubt that anyone without an advanced degree in chemistry could articulate intelligently the differences" between the controlled substances identified in the statute, "much less identify with certainty the specific controlled substances if they were shown in their raw form."

The court also noted that the lab-manufactured controlled substances "can likely be applied to any legal product" and that their presence can only be detected by scientific testing. Finally, the court concluded that the State will rarely be able to prove that a defendant knowingly possessed a prohibited chemical substance that is defined by its molecular composition, and at most can hope to prove the knowing possession of something that could be ingested for its intoxicating effects.

2. The court stressed that unlike a street corner transaction where a substance is not professionally packaged, it is difficult for a store owner to know whether a commercially packaged material contains a non-organic controlled substance defined

by its molecular composition. The court rejected the argument that because defendant knew some of his customers smoked the potpourri, he should have known it contained a controlled substance. The fact that customers might misuse the product did not indicate that defendant knew it contained a banned substance.

The court also noted that defendant willingly complied with laws and ordinances and demonstrated concern about the legality of the products offered in his store, and began to sell Bulldog Potpourri only after conducting an investigation which seemed to indicate that it did not contain a controlled substance. Because the evidence was insufficient to establish beyond a reasonable doubt that the defendant knew the potpourri contained a controlled substance, the conviction and the sentence were reversed.

(Defendant was represented by Assistant Defender Carolyn Klarquist, Chicago.)

PROBATION, PERIODIC IMPRISONMENT, CONDITIONAL DISCHARGE & SUPERVISION

§40-3(c)

People v. Scarbrough, 2015 IL App (3d) 130426 (No. 3-13-0426, 5/13/15)

1. Under 730 ILCS 5/5-6-1(j), a defendant who has been charged with driving while his license is revoked (625 ILCS 6-303(a)) is ineligible for supervision if: (1) his license was revoked because of a violation of 625 ILCS 11-501 (driving under the influence); and (2) he has a prior conviction under section 6-303 within the last 10 years.

Defendant entered a blind guilty plea to driving on a revoked license. The trial court sentenced him to 12 months of conditional discharge with 30 days in jail, finding that he was ineligible for supervision. On appeal, defendant argued that he was eligible for supervision for two reasons: (1) his license had not been revoked because of a section 11-501 violation; and (2) his prior conviction under section 6-303 had not occurred within the last 10 years. The Appellate Court upheld defendant's sentence, rejecting both of his arguments.

2. Defendant's license had been revoked because of a bond forfeiture conviction based on an underlying DUI case. The Court held that for purposes of the Illinois Driver Licensing Law (625 ILCS 5/6-100 to 6-1013) bond forfeitures constitute convictions. Defendant's bond forfeiture in a DUI case was thus the equivalent of a conviction for DUI. Accordingly, his license had been revoked because of a violation of section 11-501.

3. The Court also rejected defendant's argument that the prior conviction must have occurred within 10 years of the time defendant pled guilty in the present case. Instead, the prior conviction must have occurred within 10 years of the time defendant was charged with the present offense. Here, defendant was charged with the current

offense within 10 years from the date he was convicted of the previous 6-303 offense, and thus was not eligible for supervision.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa)

PROSECUTOR

§41-8

People v. Williams, 2015 IL App (1st) 122745 (No. 1-12-2745, mod. op. 5/5/15)

Although prosecutors have wide latitude in making closing arguments and are allowed to comment on the evidence and reasonable inferences from the evidence, they are not permitted to vouch for the credibility of a witness or use the credibility of their office to bolster testimony. By vouching for the credibility of a witness, the prosecutor improperly conveys two messages: (1) evidence not presented but known to the prosecutor supports the charges against defendant; and (2) the prosecutor's opinion carries the imprimatur of the Government and thus the jury should trust the Government's judgment rather than its own view of the evidence.

Here, the primary evidence against defendant came from the testimony of a fellow gang member and co-defendant who turned State's evidence. During closing arguments, the State told the jury that when co-defendant agreed to cooperate, the State didn't just accept what he said, but instead did further investigation to check out and corroborate his version of events.

The Appellate Court held that this argument was reversible error. The court found it especially problematic since the message here was that the State would not put an untruthful witness on the stand. The prosecutor explicitly told the jury that the co-defendant's statement had been assessed before he testified and urged the jury to believe his version of events because the government had verified what he said. "With those comments, the testimony essentially became that of the prosecutor rather than that of the witness."

The case was reversed and remanded for a new trial.

(Defendant was represented by Assistant Defender Emily Filpi, Chicago.)

SEARCH & SEIZURE

§§44-1(a), 44-1(c)(2), 44-12(a)

People v. Gaytan, 2015 IL 116223 (No. 116223, 5/21/15)

Defendant was convicted of unlawful possession of cannabis with intent to deliver when cannabis was found in his car after a traffic stop. The car was stopped because police believed that a trailer hitch obstructed the vehicle's license plate. At the time of the stop 625 ILCS 5/3-413(b) provided that a license plate must be securely fastened in a horizontal position, "in a place and position to be clearly visible and shall be maintained in a condition to be clearly legible, free from any materials that would obstruct the visibility of the plate, including, but not limited to, glass covers and plastic covers."

The court concluded that §3-413(b) is ambiguous concerning whether the prohibition applies to all materials which obstruct any part of the license plate, including the ball hitch at issue here, or only to materials which attach to and obstruct the plate. In the course of its holding, the court noted that accepting the State's interpretation of §3-413(b) would render a "substantial amount of otherwise lawful conduct illegal," including transporting electric scooters or wheelchairs on carriers on the back of a car, using bicycle racks, and towing rental trailers.

Applying the rule of lenity, the court concluded that §3-413(b) prohibits only objects which are physically connected or attached to the license plate and which obstruct the visibility and legibility of the plate. However, the court encouraged the General Assembly to clarify whether equipment and accessories attached to a vehicle near the license plate are restricted.

2. Although the statute did not apply to a trailer hitch, the court held that the stop was not improper. Under **Heien v. North Carolina**, 474 U.S. ___, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014), the Fourth Amendment is not violated where a police officer pulls over a vehicle based on an objectively reasonable but mistaken belief that traffic laws prohibit defendant's conduct. The court concluded that because §3-413(b) is ambiguous, a definitive interpretation was reached only by applying the rule of lenity, and there was no prior appellate authority concerning the scope of the statute, a reasonable police officer could have believed that §3-413(b) was violated when a trailer hitch was installed on the car.

3. The court rejected the argument that **Heien** should be rejected as a matter of state law. Illinois follows the "limited lockstep" doctrine when interpreting the search and seizure provision of the Illinois Constitution. Under this doctrine, the court presumes that the drafters of the Illinois Constitution intended the State search and seizure provision to have the same meaning as the Fourth Amendment, unless there is a reason to adopt a different meaning. Although Illinois has a more broad exclusionary rule than does federal law, **Heien** involves not the exclusionary rule but whether there is a Fourth Amendment violation in the first place. Because **Heien** concluded that the Fourth

Amendment is not violated where an officer executes a stop due to a reasonable, mistaken belief that a statute prohibits the conduct in question, no issue concerning the Illinois exclusionary rule is presented.

(Defendant was represented by Assistant Defender Larry Bapst, Springfield.)

§§44-1(a), 44-9

People v. LeFlore, 2015 IL 116799 (No. 116799, 5/21/15)

Police officers who were investigating several burglaries received a Crime Stoppers tip concerning defendant. Acting without a warrant, an officer placed a GPS device under the rear bumper of the car which defendant drove but which belonged to his girlfriend. The officer placed the GPS device while the car was parked in a lot at the apartment complex where defendant and his girlfriend lived. The trial court denied a motion to suppress evidence obtained by tracking the car's movements by use of the GPS device.

While the case was pending on appeal, the United States Supreme Court decided **U.S. v. Jones**, 565 U.S. ___, 132 S. Ct. 945 (2012), which held that placement of a GPS tracking device constitutes an unlawful "trespass" and requires a warrant. **Jones** also held that the use of a GPS device to monitor a vehicle's movements on public streets constitutes a "search" under the Fourth Amendment.

While this case was pending on appeal, the Supreme Court also decided **Davis v. U.S.**, 564 U.S. ___, 131 S. Ct. 2419 (2011), which applied the good-faith exception to the exclusionary rule where a state police officer searched a car incident to the occupant's arrest. **Davis** concluded that the good-faith exception applied where the officer acted in "objectively reasonable reliance on binding judicial precedent" which set forth a bright-line rule allowing the search. The search in **Davis** occurred before **Arizona v. Gant**, 556 U.S. 332 (2009), adopted a new rule concerning searches of cars incident to arrest.

The Illinois Supreme Court held that even if installing the GPS violated the Fourth Amendment, the good-faith exception to the exclusionary rule applied.

1. At the time of the officer's actions, **United States v. Knotts**, 460 U.S. 276 (1983) and **United States v. Karo**, 468 U.S. 705 (1984) constituted "binding judicial precedent" on which the officer could reasonably rely. The court rejected defendant's argument that for purposes of the good-faith exception, "binding judicial precedent" exists only if the authority in question is from the same jurisdiction, is followed by police to the "letter," and is on all fours with the case to be decided. Although **Knotts** and **Karo** involved placing beepers in containers which the defendants then unknowingly took into their vehicles, the court held that the rationale of those cases would have led the officer in this case to reasonably believe that the Fourth Amendment would not be violated by installing an electronic device on defendant's car. In the course of its holding, the court noted that

every Federal Court of Appeals decision to address the issue concluded that **Knotts** and **Karo** would have allowed the GPS tracker to be placed.

Alternatively, the court concluded that at the time of the search **United States v. Garcia**, 474 F.3d 994 (7th Cir. 2007), which specifically authorized the warrantless placement of a GPS device, was "binding judicial precedent" in the Seventh Circuit. The court noted that at the time the device was placed there was no Illinois authority on this question.

2. In addition, precedent defining the good-faith exception holds that the exception applies where the officer reasonably believed that his actions were proper in view of the existing "legal landscape." The good faith exception is based on the premise that no deterrent purpose is served where police act in an objectively good faith belief that their actions are proper. The court concluded that before **Jones** was decided, **Knotts** and **Karo** were widely understood as holding that the electronic surveillance of automobile movements did not implicate the Fourth Amendment. In addition, **Karo** discounted the "trespass" theory that the court in **Jones** accepted. Under these circumstances, an officer seeking to place a GPS device on defendant's car would reasonably believe that his actions were permissible.

3. The court rejected the argument that under **People v. Krueger**, 175 Ill. 2d 60, 675 N.E.2d 604 (1996), the state constitutional exclusionary rule is broader than the federal exclusionary rule and precludes application of the good faith exception here. The court concluded that **Krueger** held only that Illinois does not recognize the good faith exception where an officer relies on a statute that is later declared unconstitutional. *Krueger* does not apply where an officer relies on binding judicial precedent.

(Defendant was represented by Assistant Defender Darren Miller, Chicago.)

§44-1(a)

People v. Marion, 2015 IL App (1st) 131011 (No. 1-13-1011, mod. op. 5/12/15)

1. The court rejected the trial judge's conclusion that police officers lack authority to make an enforceable promise of leniency to a suspect in exchange for the suspect's cooperation concerning other police work. "[T]he State has vested police officers with discretionary authority to decide whether or not to arrest persons apparently violating criminal laws, and to decide whether or not to report the apparent violations. . . . Police also have authority to promise not to arrest an individual and report an apparently criminal act in exchange for cooperation in the investigation or prevention of crime."

2. The court rejected the trial court's factual finding that police did not make any promises to defendant in return for his cooperation concerning firearms offenses. The

trial judge's credibility findings are entitled to great weight, but will be overturned where the State's evidence is improbable, unconvincing, or contrary to human experience.

The court concluded that accepting the trial judge's findings would require a belief that defendant engaged in behavior that was improbable, incomprehensible, and contrary to human nature in that defendant, without any promise of leniency, spontaneously helped officers recover handguns. The court also noted that defendant's testimony that an officer had offered him leniency on an unrelated controlled substances case "credibly explains" the decision to help officers recover handguns. Under these circumstances, the lower court's credibility determination should be overturned.

Because the trial court improperly denied defendant's motion to dismiss the charges on the ground that police officers failed to comply with a promise to offer him leniency if he helped them recover firearms, defendant's convictions were vacated.

(Defendant was represented by Assistant Defender Deborah Nall, Chicago.)

§44-12(c)

People v. Smith, 2015 IL App (1st) 131307 (No. 1-13-1307, 5/29/15)

After the police stopped defendant's car for committing a moving violation, the officers saw defendant make a "furtive gesture" by reaching with his right hand towards a pouch on the back of the front passenger seat. The officers asked defendant and his passenger to step out of the car, and then searched the area where defendant had been reaching and recovered a handgun and ammunition.

In **Michigan v. Long**, 463 U.S. 1032 (1983), the Supreme Court extended **Terry** to traffic stops and held that when the police have effected a traffic stop, they may search the passenger compartment of the car, limited to those areas where a weapon may be placed or hidden, if they possess a reasonable belief based on specific and articulable facts that the defendant is dangerous and may gain immediate control of a weapon.

The Appellate Court held that defendant's furtive gestures, without more, did not provide the officers with a reasonable basis to search the car. Although furtive movements may justify a search when coupled with other circumstances, they are insufficient taken alone to provide the basis for a search.

The Court suppressed the evidence recovered from the search and reversed defendant's weapon's convictions since that was the only evidence supporting his convictions.

(Defendant was represented by Assistant Defender Josh Bernstein, Chicago.)

SENTENCING

§§45-1(b)(2),45-10(c)(4)

People v. Gipson, 2015 IL App (1st) 122451 (No. 1-12-2451, 5/27/15)

1. Defendant, who was 15 years old at the time of the offense, was automatically transferred to adult court and convicted of two counts of attempt first-degree murder. The facts at trial showed that defendant approached the driver's side of a car where two victims were sitting and fired shots at one of the victims, hitting him once. At the same time, the co-defendant approached the passenger side of the car and fired shots at the other victim, hitting him several times.

The trial court found that the 20-year enhancement applied to both of defendant's convictions under 720 ILCS 5/8-4(c)(1)(C), requiring that 20 years be added to the sentence where the defendant "personally discharged a firearm" during the commission of the offense. The court imposed the minimum sentence of 26 years (including the 20-year firearm enhancement) for both convictions, to be served consecutively for a total of 52 years.

2. Defendant argued on appeal that the firearm add-on only applied to one of his convictions since his personal discharge of a firearm injured only one victim and he was merely accountable for the other attempt murder. The Appellate Court rejected this argument. Although the add-on only applies when an accountable defendant personally discharges a firearm, it does not require that he personally discharge his firearm at the victim or injure the victim. The word "personally" only modifies the clause "discharged a firearm." The trial court thus properly imposed two firearm enchantments in this case.

3. Defendant also argued that the automatic transfer statute combined with the sentencing provisions violated the Eighth Amendment as applied to him. The Court rejected this argument, holding that defendant's 52-year sentence was not a *de facto* sentence of life imprisonment. Taking into account available sentencing credit, the Court determined that defendant could be released from prison at age 60, while the average life expectancy for someone in his position was 67.8 years. Defendant thus could, and likely would, spend the last several years of his life outside of prison. The Court found that, strictly speaking, defendant's sentence did not constitute life imprisonment and thus did not violate the Eighth Amendment.

4. The Court agreed, however, that the statutory scheme was unconstitutional as applied to defendant under the proportionate penalties clause of the Illinois Constitution. The Illinois Constitution states that "all penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. To show a violation of the clause, a defendant must show that the penalty is degrading, cruel "or so wholly disproportionate to the offense that it shocks the moral sense of the community." The clause provides a limitation on punishment beyond the eighth amendment.

The Court found that defendant's penalty shocked the moral sense of the community. Although this was a serious offense, and one of the victims suffered severe injuries, there were numerous factors that diminished "the justification for a 52-year prison term." The incident was not planned long before it occurred, but was instead the result of rash decision making. Defendant was a mentally ill juvenile who was prone to impulsive behavior, and wanted to impress his older co-defendant. And defendant did not personally inflict serious harm, even though that was primarily the result of bad aim.

The court found it meaningful that defendant had been found unfit to stand trial and thus was clearly not "at his peak mental efficiency" when the offense occurred. Defendant's inability to process information may have affected his judgment, which diminished his culpability and the need for retribution. At the same time, defendant's mental health had improved in the recent past, showing he may yet be rehabilitated. And the trial judge clearly would have imposed a shorter sentence if that had been possible. The Court found it "unsettling" that the trial court's discretion in sentencing a juvenile was frustrated by the mandatory minimum in the case. "Under these circumstances, defendant's sentence shocks the conscience and cannot pass constitutional muster."

As a remedy, the court ordered the trial court on remand to impose any appropriate Class X sentence without the mandatory firearm enhancement.

(Defendant was represented by Assistant Defender David Harris, Chicago.)

§§45-1(b)(3), 45-4(b), 45-10(c)(2)

People v. Jones, 2015 IL App (3d) 130053 (No. 3-13-0053, 5/15/15)

In **Apprendi v. New Jersey**, 530 U.S. 466 (2000), the Supreme Court held that "other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." Here defendant was sentenced to an extended term of imprisonment based on a prior juvenile adjudication that was introduced at sentencing. Defendant argued that a juvenile adjudication does not fall within the **Apprendi** exception for prior convictions, and thus his extended term sentence was unconstitutional since his prior juvenile adjudication was not submitted to the jury or proved beyond a reasonable doubt.

As a matter of first impression in Illinois, the Appellate Court found that **Apprendi's** exception for prior convictions applies to juvenile adjudications. The prior-conviction exception was justified by the procedural safeguards (fair notice, right to jury trial, proof beyond a reasonable doubt) in place at the time of the prior conviction. The Court found that an adjudication of juvenile delinquency, while not containing all the procedural safeguards of a criminal trial, provided "a no less reliable basis for the enhancement of a sentence than is a standard adult criminal conviction," and was

"sufficiently analogous to a prior criminal conviction to fall under the exception in **Apprendi**."

Accordingly, the State was not required to include the fact of defendant's prior adjudication in the indictment, present the fact to a jury, or prove it beyond a reasonable doubt. Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Josette Skelnik, Elgin.)

§45-9(c)(3)

People v. Ramirez, 2015 IL App (1st) 130022 (No. 1-13-022, modified upon denial of rehearing 5/27/15)

Under 730 ILCS 5/5-8-4(d)(1), consecutive sentences are mandatory where defendant was convicted of a Class X or Class 1 felony and inflicted "severe bodily injury." Here defendant was convicted of the Class X offense of attempt first degree murder involving "great bodily harm." The State argued that the jury's finding of great bodily harm mandated consecutive sentences.

The Appellate Court disagreed. It held that the jury's finding of great bodily harm at trial was not the equivalent of a finding at sentencing that defendant inflicted severe bodily injury. Instead, severe bodily injury requires a degree of harm that is more than great bodily harm. The imposition of concurrent sentences was affirmed.

(Defendant was represented by Assistant Defender Allison Shah, Chicago.)

§45-13

People v. Scarbrough, 2015 IL App (3d) 130426 (No. 3-13-0426, 5/13/15)

1. Under 730 ILCS 5/5-6-1(j), a defendant who has been charged with driving while his license is revoked (625 ILCS 6-303(a)) is ineligible for supervision if: (1) his license was revoked because of a violation of 625 ILCS 11-501 (driving under the influence); and (2) he has a prior conviction under section 6-303 within the last 10 years.

Defendant entered a blind guilty plea to driving on a revoked license. The trial court sentenced him to 12 months of conditional discharge with 30 days in jail, finding that he was ineligible for supervision. On appeal, defendant argued that he was eligible for supervision for two reasons: (1) his license had not been revoked because of a section 11-501 violation; and (2) his prior conviction under section 6-303 had not occurred within

the last 10 years. The Appellate Court upheld defendant's sentence, rejecting both of his arguments.

2. Defendant's license had been revoked because of a bond forfeiture conviction based on an underlying DUI case. The Court held that for purposes of the Illinois Driver Licensing Law (625 ILCS 5/6-100 to 6-1013) bond forfeitures constitute convictions. Defendant's bond forfeiture in a DUI case was thus the equivalent of a conviction for DUI. Accordingly, his license had been revoked because of a violation of section 11-501.

3. The Court also rejected defendant's argument that the prior conviction must have occurred within 10 years of the time defendant pled guilty in the present case. Instead, the prior conviction must have occurred within 10 years of the time defendant was charged with the present offense. Here, defendant was charged with the current offense within 10 years from the date he was convicted of the previous 6-303 offense, and thus was not eligible for supervision.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa)

§45-14(c)

People v. Edwards, 2015 IL App (3d) 130190 (No. 3-13-0190, 5/6/15)

Defendant, who was 17 years old at the time of the offense, was convicted of first degree murder and attempt murder. Because of firearm add-ons, the minimum sentences applicable in this case were 45 years for murder and 31 years for attempt murder, and since the sentences were required to be served consecutively, the total mandatory minimum was 76 years. The court sentenced defendant to consecutive terms of 50 years for murder and 40 years for attempt murder, for a total of 90 years.

Defendant argued that his 76-year mandatory minimum sentence was unconstitutional under **Miller v. Alabama**, 132 S.Ct. 2455 (2012). The Appellate Court disagreed. Defendant's sentence of 90 years was 14 years over the mandatory minimum, and the Court found no authority allowing a defendant to argue that a sentence he did not actually receive was unconstitutional.

Moreover, **Miller** did not hold that a juvenile could never be sentenced to life imprisonment. It instead held that a mandatory sentence of life imprisonment was unconstitutional since the court had no discretion to consider mitigating factors. Here, the trial court sentenced defendant to a term of imprisonment above the mandatory minimum, and thus **Miller** did not apply.

Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Bryon Kohut, Ottawa.)

§45-14(c)

People v. Reyes, 2015 IL App (2d) 120471 (No. 2-12-0471, 5/6/15)

Defendant, who was 16 years old at the time of the offense, was convicted of first degree murder and two counts of attempt first degree murder. He was sentenced 45 years imprisonment for first degree murder and 26 years for each count of attempt murder, all sentences to run consecutively for a total of 97 years. Defendant would have to serve 89 years of that term and would not be eligible for MSR until he was 105 years old.

Defendant argued that his 97-year sentence was a *de facto* natural life sentence that would be unconstitutional under **Miller v. Alabama**, 132 S.Ct. 2455 (2012). The Appellate Court disagreed, declining to extend **Miller** to this case. Unlike the **Miller** defendants, who were sentenced to natural life without the possibility of parole based on single murder convictions, here defendant received consecutive sentences based on multiple counts and multiple victims. Moreover, "defendant did not receive the most severe of all possible penalties, such as the death penalty or life without the possibility of parole."

Defendant's sentence was affirmed.

(Defendant was represented by Assistant Defender Kathy Hamill, Elgin.)

STATUTES

§48-3(c)

People v. Richardson, 2015 IL 118255 (No. 118255, 5/21/15)

The right to equal protection guarantees that similarly situated individuals will be treated in a similar manner unless the State can demonstrate an appropriate reason to treat them differently. When a legislative classification does not affect a fundamental right or discriminate against a suspect class, courts apply a rational basis scrutiny and consider whether the classification bears a rational relationship to a legitimate governmental purpose.

The State charged defendant, who was 17 years old at the time of the offenses, as an adult with criminal sexual assault and criminal sexual abuse. At the time of the offenses, the Juvenile Court Act only applied to minors under 17 years of age. The Act was subsequently amended to apply to minors under the age of 18. The amendment included a savings clause that made the changes in the statute applicable to offenses that occurred on or after the effective date of the amendment. 705 ILCS 405/5-120.

Defendant argued that the savings clause violated equal protection because he was similarly situated to 17-year-olds who committed offenses on or after the amendment's effective date, and there was no rational basis to treat him differently.

The Court rejected defendant's argument. It held that the legislative classification in the savings clause was rationally related to the legislature's goal of including 17-year-olds within the jurisdiction of the Juvenile Court Act. By limiting the amendment to offenses committed on or after the effective date, both defendants and courts are on notice as to whether the Act will apply. The savings clause also ensures that cases already in progress would not have to restart in juvenile court and defendants could not manipulate or delay proceedings to take advantage of the amendment.

The Court reversed the trial court's judgment declaring the savings clause unconstitutional as applied to defendant and remanded the cause for further proceedings.

(Defendant was represented by Assistant Defender Sherry Silvern, Elgin.)

TRAFFIC OFFENSES

§50-1

People v. Gaytan, 2015 IL 116223 (No. 116223, 5/21/15)

Defendant was convicted of unlawful possession of cannabis with intent to deliver when cannabis was found in his car after a traffic stop. The car was stopped because police believed that a trailer hitch obstructed the vehicle's license plate. At the time of the stop 625 ILCS 5/3-413(b) provided that a license plate must be securely fastened in a horizontal position, "in a place and position to be clearly visible and shall be maintained in a condition to be clearly legible, free from any materials that would obstruct the visibility of the plate, including, but not limited to, glass covers and plastic covers."

The court concluded that §3-413(b) is ambiguous concerning whether the prohibition applies to all materials which obstruct any part of the license plate, including the ball hitch at issue here, or only to materials which attach to and obstruct the plate. In the course of its holding, the court noted that accepting the State's interpretation of §3-413(b) would render a "substantial amount of otherwise lawful conduct illegal," including transporting electric scooters or wheelchairs on carriers on the back of a car, using bicycle racks, and towing rental trailers.

Applying the rule of lenity, the court concluded that §3-413(b) prohibits only objects which are physically connected or attached to the license plate and which obstruct the visibility and legibility of the plate. However, the court encouraged the General Assembly to clarify whether equipment and accessories attached to a vehicle near the license plate are restricted.

2. Although the statute did not apply to a trailer hitch, the court held that the stop was not improper. In **Heien v. North Carolina**, 474 U.S. ___, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014), the court concluded that the Fourth Amendment is not violated where a police

officer pulls over a vehicle based on an objectively reasonable but mistaken belief that traffic laws prohibit defendant's conduct. The court concluded that because §3-413(b) is ambiguous, a definitive interpretation was reached only by applying the rule of lenity, and there was no prior appellate authority concerning the scope of the statute, a reasonable police officer could have believed that §3-413(b) was violated when a trailer hitch was installed on the car.

3. The court rejected the argument that **Heien** should be rejected as a matter of state law. Illinois follows the "limited lockstep" doctrine when interpreting the search and seizure provision of the Illinois Constitution. Under this doctrine, the court presumes that the drafters of the Illinois Constitution intended the State search and seizure provision to have the same meaning as the Fourth Amendment, unless there is a reason to adopt a different meaning. Although Illinois has a more broad exclusionary rule than does federal law, **Heien** involves not the exclusionary rule but whether there is a Fourth Amendment violation in the first place. Because **Heien** concluded that the Fourth Amendment is not violated where an officer executes a stop due to a reasonable, mistaken belief that a statute prohibits the conduct in question, no issue concerning the Illinois exclusionary rule is presented.

(Defendant was represented by Assistant Defender Larry Bapst, Springfield.)

§50-1

People v. Scarbrough, 2015 IL App (3d) 130426 (No. 3-13-0426, 5/13/15)

1. Under 730 ILCS 5/5-6-1(j), a defendant who has been charged with driving while his license is revoked (625 ILCS 6-303(a)) is ineligible for supervision if: (1) his license was revoked because of a violation of 625 ILCS 11-501 (driving under the influence); and (2) he has a prior conviction under section 6-303 within the last 10 years.

Defendant entered a blind guilty plea to driving on a revoked license. The trial court sentenced him to 12 months of conditional discharge with 30 days in jail, finding that he was ineligible for supervision. On appeal, defendant argued that he was eligible for supervision for two reasons: (1) his license had not been revoked because of a section 11-501 violation; and (2) his prior conviction under section 6-303 had not occurred within the last 10 years. The Appellate Court upheld defendant's sentence, rejecting both of his arguments.

2. Defendant's license had been revoked because of a bond forfeiture conviction based on an underlying DUI case. The Court held that for purposes of the Illinois Driver Licensing Law (625 ILCS 5/6-100 to 6-1013) bond forfeitures constitute convictions. Defendant's bond forfeiture in a DUI case was thus the equivalent of a conviction for DUI. Accordingly, his license had been revoked because of a violation of section 11-501.

3. The Court also rejected defendant's argument that the prior conviction must have occurred within 10 years of the time defendant pled guilty in the present case. Instead, the prior conviction must have occurred within 10 years of the time defendant was charged with the present offense. Here, defendant was charged with the current offense within 10 years from the date he was convicted of the previous 6-303 offense, and thus was not eligible for supervision.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa)

TRIAL PROCEDURES

§52-7

People v. Flemming, 2014 IL App (1st) 111925-B (No. 1-11-1925, 5/1/2015)

1. When a defendant alleges his counsel's ineffectiveness in a *pro se* motion for a new trial, the court should conduct a **Krankel** hearing to examine the factual matters underlying defendant's claim to determine whether new counsel should be appointed. **People v. Krankel**, 102 Ill. 2d 181 (1984); **People v. Nitz**, 143 Ill. 2d 82 (1991).

2. The operative concern in a **Krankel** hearing is whether the trial court conducted an adequate inquiry into the defendant's *pro se* allegations. If the court determines that the claims lack merit it does not need to appoint new counsel. If the court finds that the claims show possible neglect, the case proceeds to the second step in a **Krankel** hearing, an adversarial proceeding in which new counsel must be appointed to represent defendant on his claim of ineffectiveness.

Here, defendant made an oral *pro se* motion alleging that his counsel was ineffective for failing to present evidence supporting his theory of defense. After hearing defendant's allegations, the court did not directly question or otherwise interact with defense counsel. Instead, the court directed the prosecutor to question defense counsel about defendant's allegations. After hearing defense counsel's answers, the court denied defendant's motion.

On appeal, defendant argued that the trial court failed to conduct a proper judicial inquiry "one-on-one style" with defendant and counsel, and instead conducted a full-blown adversarial hearing where defendant had no representation. Defendant argued that the trial court improperly compressed the two steps in a **Krankel** hearing but failed to properly execute either of them.

3. The Appellate Court rejected defendant's argument that the prosecutor's questioning of defense counsel was a full-blown second-stage adversarial hearing. The questioning was conducted at the court's direction, was very brief, and directed solely at answering defendant's allegations. Such questioning was clearly a preliminary inquiry

designed to give the court information about defendant's claims in order to decide whether new counsel should be appointed.

Additionally, the fact that the trial court did not personally question defense counsel did not make this an improper hearing. There is no set format for conducting the initial inquiry in a **Krankel** hearing. Some interchange between the court and counsel is permissible and usually necessary, but the trial court's method of inquiry is somewhat flexible.

4. But, if the State's participation during the preliminary inquiry is anything more than *de minimis*, there is an unacceptable risk that the inquiry will become an improper adversarial proceeding with both the State and trial counsel opposing defendant. The purpose of **Krankel** is best served by having a neutral trier of fact evaluate the claims without the State's adversarial participation. When the State questions defendant's trial counsel in a manner contrary to defendant's allegations, the State's participation is not *de minimis* and is reversible error. **People v. Jolly**, 2014 IL 117142.

Here, although the State's participation was minimal, its questioning of defense counsel tended to counter defendant's allegations. Such questioning was contrary to the intent of a preliminary **Krankel** inquiry and was reversible error.

The case was remanded for a new preliminary **Krankel** hearing before a different trial judge and without the State's adversarial participation.

(Defendant was represented by Assistant Defender Chris Gehrke, Chicago.)

UNLAWFUL USE OF WEAPONS

§53-1

People v. Deleon, 2015 IL App (1st) 131308 (No. 1-13-1308, 5/28/15)

Defendant was convicted of unlawful sale or delivery of a firearm, which prohibits the delivery of a firearm, incidental to a sale, within 72 hours after "application for its purchase has been made." Application is defined as "when the buyer and seller reach an agreement to purchase a firearm." 720 ILCS 5/24-3(A)(g).

The evidence showed that defendant acted as the straw purchaser of a firearm for his friend, Hill, at a store in Indiana. At Hill's request, defendant picked out the gun and paid for it with Hill's money. Four days later, defendant and Hill returned to Indiana, defendant picked up the gun and the gave it to Hill after they returned to Illinois.

The Appellate Court held that the State failed to prove defendant guilty beyond a reasonable doubt. The record contained no evidence that defendant and Hill reached

an agreement to purchase the gun that would have triggered the 72 hour waiting period. Instead, the evidence showed that defendant and Hill reached an agreement for defendant to act a straw purchaser to obtain the gun for Hill. Since the agreement to provide services is not an agreement to purchase, the transfer of the gun from defendant to Hill did not trigger a waiting period.

Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Mike Gentithes, Chicago.)

§53-1

People v. Irby, 2015 IL App (3rd) 130429 (No. 3-13-0429, 5/11/15)

Defendant was charged with aggravated unlawful use of a weapon for knowingly carrying an "uncased, loaded, and immediately accessible" firearm in a vehicle. 720 ILCS 5/24-1.6(a)(1), (3)(A). The parties stipulated that officers searched the car of defendant's girlfriend after a traffic violation and found a loaded handgun under the right rear passenger seat. The stipulation made no mention whether the firearm was cased. Although the vehicle belonged to defendant's girlfriend and was parked, defendant was considered to be in control because he was seated in the driver's seat.

The court concluded that the State's burden of proof included showing that the weapon was uncased, and declined to infer that the weapon was uncased merely because the defense failed to present any evidence to the contrary. Defendant's conviction was reversed.

(Defendant was represented by Assistant Defender Dimitri Golfis, Ottawa.)

WAIVER - PLAIN ERROR - HARMLESS ERROR

§56-1(9)(a)

People v. Ramirez, 2015 IL App (1st) 130022 (No. 1-13-022, modified upon denial of rehearing 5/27/15)

Defendant argued on appeal that the trial court considered improper factors at sentencing. Defendant conceded that the issue was forfeited, but argued in a single paragraph that it should be considered under the plain-error rule "because consideration of an improper sentencing factor is plain error." Defendant cited **People v. James**, 255 Ill. App. 3d 516 (1st Dist. 1993) for the proposition that the consideration of improper factors at sentencing is plain error.

The Appellate Court held that defendant waived his plain error argument on appeal by failing to "expressly argue, much less develop the argument that either prong of the doctrine is satisfied." The court also noted that the holding of **James**, that every sentencing error involving the consideration of improper factors is plain error, would swallow the rule of forfeiture. The Court thus declined to conduct a plain error analysis and affirmed defendant's sentence.

(Defendant was represented by Assistant Defender Allison Shah, Chicago.)

§§56-2(a), 56-2(b)(1)(a), 56-2(b)(6)(a)

People v. Booker, 2015 IL App (1st) 131872 (No. 1-13-1872, 5/12/15)

As a matter of plain error under the second-prong of the plain error rule, the court found that a defendant who was charged with home invasion while armed with a firearm could not be convicted of home invasion while armed with a dangerous weapon other than a firearm. Second-prong plain error applies where an unpreserved error violates due process and implicates the integrity of the judicial process.

The court rejected the argument that in Illinois, second-prong plain error is equivalent to "structural error" under the federal constitution and is recognized only where there is a complete denial of counsel, trial before a biased judge, racial discrimination in the selection of the grand jury, denial of the right to self-representation at trial, denial of a public trial, or defective reasonable doubt instructions. The court noted that Illinois case law does not restrict plain error to the six types of structural error listed above, and that the Illinois Supreme Court has found second-prong plain error concerning other issues.